

***DISTRICT OF MAINE***

***Docket No. 00-202-P-H***

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*et seq.*; and breach of contract, negligent infliction of emotional distress, conversion and intentional infliction of emotional distress, Complaint (copy attached to Exh. A to Affidavit of James R. Erwin (“Erwin Aff.”), filed with Notice of Removal (Docket No. 1)), at 7-12, was filed in the Maine Superior Court (Knox County) on May 26, 2000. Docket Sheet, *Faller v. MBNA Marketing Sys., Inc.*, Docket No. CV-00-032, Maine Superior Court (Knox County), Exh. A to Erwin Aff. Defendant MBNA Marketing Systems, Inc. (“MBNA”) removed the case to this court on July 7, 2000. Notice of Removal.

### **Discussion**

A second amended complaint (Docket No. 9) appears to be the operational document at the present time. It alleges that Faller was constructively discharged from her employment with MBNA on June 11, 1998. Second Amended Complaint ¶ 3A. The bankruptcy trustee asserts, Motion at [1], and Faller does not deny, that she did not indicate that she had a potential claim against MBNA in response to questioning “at the Section 341 meeting held on or about October 18, 1999” in connection with her bankruptcy petition. The trustee states that he was notified of the existence of this action on or about December 21, 2000. Motion at [2]. The motion to substitute was filed on January 8, 2001.

The plaintiff filed an objection to the motion on January 24, 2001, accompanied by a copy of amendments to the schedules filed in her bankruptcy case with the same date. Plaintiff’s Objection to Bankruptcy Trustee’s Motion to Substitute Real Party in Interest, etc. (“Plaintiff’s Objection”) (Docket No. 26) & Exh. A thereto. The plaintiff does not contest the trustee’s assertion that potential causes of action that may be asserted by a debtor become property of the bankruptcy estate vested in the bankruptcy trustee. *See, e.g., In re Rare Coin Galleries of Am., Inc.*, 862 F.2d 896, 901 (1st Cir. 1988) (bankruptcy trustee steps into shoes of debtor for purposes of asserting or maintaining debtor’s causes of action for negligence, breach of contract, negligent misrepresentation and unfair or deceptive

practices, which become property of the estate); *Matter of Yonikus*, 996 F.2d 866, 869-70 (7th Cir. 1993) (potential personal injury and workers' compensation claims part of bankruptcy estate). Instead, she contends that a portion of her recovery on the claims asserted in this action will be exempt under state law, so that she has standing to pursue this action herself; and that, since MBNA was her "largest unsecured creditor," it would simply settle the non-exempt claims with the trustee if he were substituted as the plaintiff, "creating a windfall for defendant and financial disaster for plaintiff." Plaintiff's Objection at 1-4.

Contrary to the plaintiff's argument, none of the potential proceeds of this action is yet exempt from the claims of creditors in her bankruptcy. That determination will be made by the bankruptcy court, unless neither the trustee nor any of Faller's creditors files an objection to her claimed exemptions, an unlikely event. 11 U.S.C. § 522(*l*) (property claimed exempt on list properly filed is exempt unless a party in interest objects); Fed. R. Bankr. 4003(b) & (c) (trustee or any creditor may file objections to claimed exemptions within 30 days after meeting of creditors or filing of any amendment to the list or supplemental schedule; court will decide issues presented by objections after hearing at which objecting party has burden of proof).<sup>2</sup> *See generally In re Rundlett*, 149 B.R. 353, 358 (S.D. N.Y. 1993). If the bankruptcy court decides at the appropriate time that some portion of the potential proceeds of this action will be exempt under Maine law, it may allow Faller to pursue that portion of this claim at that time. Deciding that issue in this court at this time

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<sup>2</sup> Here, the amended bankruptcy schedules claiming the partial exemptions are dated January 24, 2001 and could not have been filed before that date. The thirty days for filing of objections has not yet passed, and the trustee's motion to substitute may reasonably be interpreted as an indication that he will file such an objection.

would clearly be premature.<sup>3</sup>

Faller's contention that MBNA would receive a "windfall" and that she would be subjected to "financial disaster" if the trustee were allowed to take over this action ignores both the responsibilities of the trustee and the bankruptcy court to apply federal bankruptcy law fairly and conscientiously and the purpose of federal bankruptcy law in general. To allow a debtor to avoid some portion of her obligations to her creditors by concealing an asset that should be included in the bankruptcy estate as a matter of law, however inadvertent that concealment may have been initially, would subvert the purposes of federal bankruptcy law and encourage less-than-inadvertent concealment. *See Rosenshein v. Kleban*, 918 F. Supp. 98, 103 (S. D. NY. 1996) (citing cases).

Substitution of the trustee for Faller as the plaintiff in this action is appropriate at this time. *Bickford v. Ponce de Leon Care Ctr.*, 918 F. Supp. 377, 378 (M.D. Fla. 1996).

### **Conclusion**

For the foregoing reasons, the motion of the bankruptcy trustee to substitute himself for the named plaintiff in this action is **GRANTED**. The clerk is directed to change the caption of this action to read "P. J. Perrino, Jr., in his capacity as trustee of the bankruptcy estate of Candace Faller, Plaintiff, v. MBNA Marketing Systems, Inc., Defendant."

Dated this 12th day of February 2001.

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David M. Cohen  
United States Magistrate Judge

CANDACE FALLER

CYNTHIA A. DILL, ESQ.

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<sup>3</sup> Faller may also petition the bankruptcy court at the appropriate time to compel the trustee to abandon the estate's interest in this claim. 11 U.S.C. § 554.

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PASQUALE PERRINO, In His  
Capacity as Trustee,  
Bankruptcy Estate of Candace  
Faller  
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